

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1201**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**In re the Marriage of:**

**CHARLES K. MC MANUS,**

**Petitioner-Appellant-  
Cross Respondent,**

**v.**

**CAROLYNN S. MC MANUS,**

**Respondent-Respondent-  
Cross Appellant.**

APPEAL and CROSS-APPEAL from orders of the circuit court for Waukesha County: CLAIR VOSS, Judge. *Affirmed in part and reversed in part.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. Charles K. McManus appeals from a trial court order construing a marriage settlement agreement. The court determined that each month that Charles' income falls below a certain threshold, Carolyn

S. McManus is allowed to exercise an option to determine which of two possible formulas will be used to calculate Charles' payment to her. Carolynn cross-appeals and contends that the trial court erred: (1) when it disallowed inclusion of Charles' interest income on money he had transferred into accounts bearing his current wife's name, (2) in its determination as to the method of accounting which should be utilized to calculate Charles' monthly income, and (3) when it adopted Charles' proposed findings in its order.

We conclude that the trial court's interpretation of the marriage settlement agreement was proper and affirm the appeal. However, because we conclude that the trial court erred in its determination of that portion of Charles' interest income which should be included in calculating his total income and in allowing him to utilize the accrual method of accounting, we reverse the trial court on the cross-appeal.

Charles and Carolynn were divorced in 1990. As part of the divorce decree, and in lieu of other support, Charles and Carolynn entered into a settlement agreement. Because of a dispute over the calculation of certain payments which were part of the agreement, Carolynn brought an action to enforce the agreement.

The trial court found the language of the contract to be unambiguous. Based on this, the trial court determined that if Charles' income fell below \$17,500 per month when averaged over a six-month period, Carolynn would be able to elect which of two methods would be used to calculate the amount of Charles' payments due her. This election would be allowed each

month that Charles' income was below the threshold average, and both the method of calculation and the resulting payment could change from month to month.

The trial court also found that investment income on money Charles had transferred into joint accounts with his current wife, as well as money he placed solely in the name of his current wife, were not to be included in calculating his income. The trial court then adopted two accounting methods for determining the amount of Charles' payments: the accrual method for those payments made prior to May 25, 1994, and the cash method to calculate payments made after that date. The trial court also adopted Charles' proposed findings and order.

Charles appeals the trial court's interpretation of the "Section 71"<sup>1</sup> language in the marriage settlement agreement. Carolynn cross-appeals the trial court's findings with regard to the calculation of Charles' earned income.

The issues in this case require an interpretation of a written agreement. The interpretation of an unambiguous written document is a question of law. *Jacobs v. Jacobs*, 138 Wis.2d 19, 23, 405 N.W.2d 668, 669 (Ct. App. 1987). The construction of a contract requires this court to ascertain the true intention of the parties as it is expressed in the language of the agreement. *Antuk v. Antuk*, 130 Wis.2d 340, 343, 387 N.W.2d 80, 81 (Ct. App. 1986). This court may determine questions of law independently of the trial court and owes

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<sup>1</sup> This refers to 26 U.S.C. § 71, entitled "Alimony and separate maintenance payments."

the trial court no deference. See *Levy v. Levy*, 130 Wis.2d 523, 529, 388 N.W.2d 170, 172-73 (1986).

The relevant portion of the marriage settlement agreement reads as follows:

§71 PAYMENTS

9. A. Cash Payments.

Husband shall pay cash payments to the wife as follows:

- (1) \$7,000 per month commencing April 1, 1990, on the first of each month thereafter, payable until either party's death, or March 31, 2000, whichever occurs first;
- (2) \$4,000 per month commencing April 1, 2000, on the first of each month thereafter, payable until either party's death, or March 31, 2012, whichever occurs first.

....

C. The parties contractually agree that in the event the husband's total income is less than \$17,500 per month, on average for a six month period, the payments in paragraph 9.A.(1) and 9.A.(2) shall be adjusted as follows:

- (1) Paragraph 9.A.(1) payments shall be adjusted down to either 40% of husband's gross earned income, not to exceed the amount specified in paragraph 9.A.(1), or at the sole option of the wife, to an amount sufficient to equate wife's total income to 45% of the combined total income of husband and wife, not to exceed \$7,000 per month.
- (2) Paragraph 9.A.(2) payments shall be adjusted down to either 40% of husband's gross earned income, not to exceed the amount specified in paragraph 9.A.(2), or at the

sole option of the wife, to an amount sufficient to equate wife's total income to 45% of the combined total income of husband and wife, not to exceed \$4,000 per month.

Charles contends that a plain reading of this agreement supports his position that once his averaged income falls below the threshold figure, para. 9.C. is triggered and supersedes para. 9.A. According to Charles, Carolynn is then allowed a one-time election of the method of calculation and that formula will then be followed for the duration of the agreement.

Carolynn argues, and the trial court found, that the calculation is to be made *each* month pursuant to para. 9.C. If the six-month average is less than \$17,500, Carolynn alone chooses the option for that month, logically the option which will yield an amount as close as possible to the maximum payment allowed by the contract.<sup>2</sup>

The trial court determined that “[t]he flexibility of the Section 71 payments [is] to allow relief if something unforeseen should happen to Charles' ability to pay.” As the court noted, “Charles has a long term obligation and to interpret the contract as Charles suggests would allow him to decrease his income at any one point and undermine the entire agreement.” The court also found that Section 71 para. 9.C. overrides para. 9.A., *only* in an individual month in which Charles' six-month average is less than \$17,500.

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<sup>2</sup> For example, if Charles had a total income for one month of \$15,556 and Carolynn had no income that month, Carolynn could elect to receive 45% of the total income and would receive a payment of \$7000. However, if Carolynn had other income totaling \$2000, she could then elect the 40% option and receive \$6222 from Charles. Carolynn would never receive more from Charles than the maximum allowed under the contract.

Our independent review of the language in the settlement agreement leads us to conclude that the trial court properly construed the contract. Charles agreed to definite payments for twenty-two years after the divorce. Included in that agreement is protection for Charles should his monthly income decrease substantially.<sup>3</sup> Under such circumstances, Carolynn may receive less than the maximum contracted for amount, but is protected by the unilateral right to choose the most advantageous formula for calculating Charles' payments. The intention of the settlement agreement was to provide Carolynn with predetermined monthly payments, with built-in protection for Charles. The trial court's construction of the agreement upheld this intention, and we affirm.

Carolynn cross-appeals the trial court's determination of what is to be included in Charles' monthly income and how this figure is calculated from month to month. The agreement states that the calculations are to be based upon Charles' "total income." Charles contends that because he has remarried and his cash assets reside in jointly titled accounts, only one-half of the investment income is included in the "total income" calculation.<sup>4</sup> The trial court upheld this when it ruled that "[e]arnings on money held in the name of Charles' present wife, whether in an individual account or her 50% ownership

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<sup>3</sup> At the time of the divorce, Charles earned a gross monthly income of \$23,489.

<sup>4</sup> He bases this argument on the fact that as a resident of Texas, a marital property state, one-half of his assets, if held jointly, are his current wife's property. Therefore, he contends, interest on that money would no longer be included in his total income.

share of a joint account is [sic] not assessable to the Section 71 payments.” We disagree.

Charles entered into the marriage settlement agreement before he remarried. In the contract, he agreed to make certain payments to Carolynn. While the payments would never exceed the agreed-upon “cap,”<sup>5</sup> each monthly payment was based on Charles' total income. Total income is money derived from Charles' earnings—both earned income and investment income.

In this case, Charles enjoys a significant source of investment income. While the interest and principal of these holdings belong to Charles, and the agreement places no restriction on his right to access and use these funds, all of the interest earned from the corpus is countable in Charles' total income. His current marital status has no effect on his previous contractual obligations; his attempt to divest himself of one-half of the principal and the resulting stream of income is not proper. The interest income is new income each month and it must be included in Charles' total income. Therefore, we reverse that part of the order.

Carolynn also contends that the trial court erred when it allowed Charles to use the accrual method of accounting. The marriage settlement agreement does not address the accounting method which should be utilized to determine Charles' monthly income, although it plainly requires a monthly

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<sup>5</sup> It is undisputed that the payments to Carolynn will never exceed \$7000 per month during the first ten years of the contract and \$4000 per month the next twelve years of the agreement.

determination of Charles' total income. Charles argues that the accrual method is acceptable, while Carolynn submits that the cash method is more appropriate. The accrual method recognizes income when it is earned, while the cash method recognizes income when it is received. Both are recognized methods of accounting.

An appropriate valuation methodology is committed to the trial court's discretion. *Sharon v. Sharon*, 178 Wis.2d 481, 489, 504 N.W.2d 415, 419 (Ct. App. 1993). The exercise of discretion is not the same as unfettered decision making. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The trial court's decision must be the result of a rational process, chosen for the purpose of achieving a reasoned and reasonable determination. *See id.*

After finding that the marriage settlement agreement did not specify whether the cash or accrual method would be utilized, the court ordered that all future monthly accountings would be on the basis of the cash method. The court acknowledged that "logistically, it is easier for all parties to see and compute these figures when the cash or payments are actually received. ... When the money is actually received by an individual, then and only at that time does the obligation to make payments attach." The court, however, allowed the accrual method of accounting to be utilized in determining Charles' past obligations.

We disagree with the trial court's utilization of the accrual method for determining Charles' past monthly income. We surmise that the trial court failed to recognize the impact of utilizing the accrual method of accounting

under this contract. The agreement specified that Charles' total income was always to be averaged over the past six-month period, an arrangement which recognized the variability in Charles' month-to-month income statements.

While both the cash and accrual methods are based on sound accounting principles, the two experts who testified stated that under these facts, the cash method was the appropriate method to employ. The differences between the two methods of accounting become clear when considering the following transaction.

In February 1991, Charles sold some stock on an installment basis. He received a note, the terms of which provided for a portion of the capital gains and interest to be received each February in a lump sum, through February 1995. Under the accrual method of accounting, the capital gains would be recognized in its entirety in February 1991, at which time his income was over the threshold amount and the parties were operating under para. 9.A. of the agreement. Although Charles continued to receive a substantial lump sum payment for four additional years, this income, under the accrual method, would never again be included in calculating Carolynn's payments. Under the cash method of accounting, Charles' once-yearly payment from the note would be included in his income every February and used to calculate his six-month income average.

We conclude that while the trial court correctly determined that the cash method of accounting was the appropriate method to use in all future calculations, it erred when it accepted use of the accrual method for

determining past income. By including a “rolling horizon” and the method of averaging Charles' income over a six-month period, the agreement contemplates the variability which has, in fact, occurred. Adopting the accrual method allowed Charles to avoid having a substantial stream of income included in his total income and was a misuse of discretion. Consequently, we reverse the trial court's determination that the accrual method of accounting could validly be employed under this agreement.

Finally, Carolynn contends that the trial court erred when it adopted Charles' proposed findings and order when these were contrary to the court's decision. Because of the reversal on the other issues, this contention is moot. A matter is moot if a determination sought cannot have a practical effect on an existing controversy. *City of Racine v. J-T Enters. of Am.*, 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974).

Costs are denied to both parties.

*By the Court.* – Orders affirmed in part and reversed in part.

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